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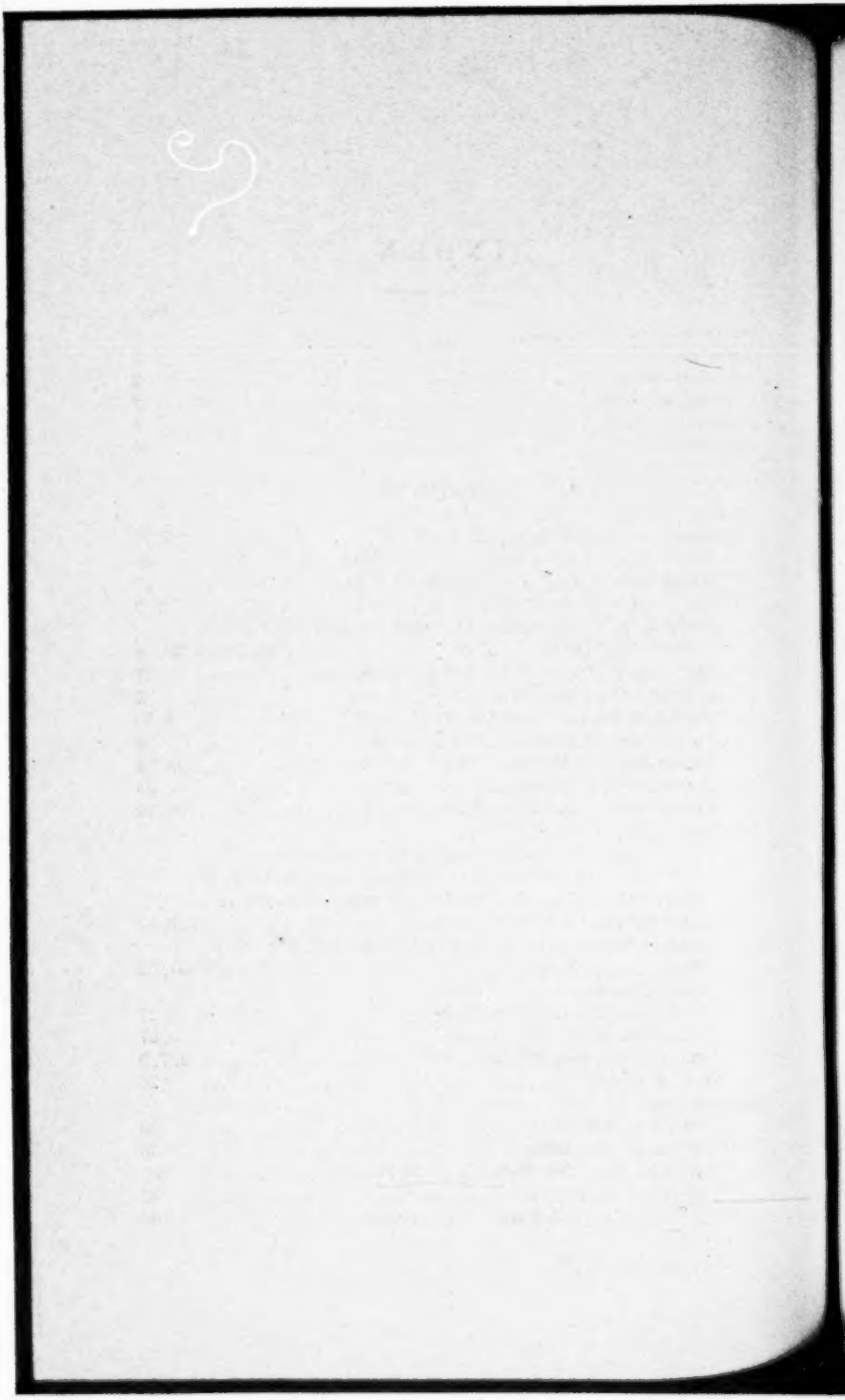

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 561

HAROLD GOTTFRIED AND PURE ROCK MINERAL SPRINGS CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 562

HAROLD GOTTFRIED, JOSEPH FORMAN AND WILLIAM STANTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 2462–2474) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered January 2, 1948 (R. 2474–2475). The petition for writs of certiorari was filed January 30, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the grand and petit jurors were summoned in conformity with Section 277 of the Judicial Code.

2. Whether petitioners were denied a fair trial because of the alleged misconduct of a juror who was excused before the case was submitted to the jury.

3. Whether the trial judge erred in finding that petitioner Stanton's statement of June 16, 1945, was voluntarily made.

4. Whether a prosecution under the False Claims Statute is for defrauding the United States within the meaning of 18 U. S. C. 590a.

STATUTES INVOLVED

Section 277 of the Judicial Code (28 U. S. C. 413) provides:

> Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden

the citizens of any part of the district with such service.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object to the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 35A of the Criminal Code (18 U. S. C. 80) provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, *or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt,

> voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. [Italics added.]

STATEMENT

On January 28, 1946, petitioners Gottfried and Pure Rock Mineral Springs Corporation were indicted in the United States District Court for the Southern District of New York in two counts charging that they made false and fraudulent statements to the Office of Price Administration in obtaining sugar rations, in violation of Section 35A of the Criminal Code (R. 13–22).[1] An additional indictment returned January 28, 1946, charged that Gottfried and petitioners Forman and Stanton conspired, in violation of Section 37 of the Criminal Code, to defraud the United States of the fair and honest services of Stanton, who was an investigator of the Office of Price Administration, and that the conspiracy contemplated bribing Stanton not to report violations which were committed by Gottfried and Pure Rock Mineral Springs Corporation (R. 23–28).

[1] It appears that as a result of the false statements, these petitioners obtained an allotment of approximately one million pounds of sugar in excess of their allowable quota (R. 2302).

The indictments were consolidated for trial, and after a protracted jury trial the petitioners were convicted (R. 2286). The corporation was sentenced generally to pay a fine of $10,000 (R. 2428). Petitioner Gottfried was sentenced to imprisonment for three years on each count of the substantive indictment and for one year on the conspiracy charge, the sentences to be served concurrently, and to pay fines totaling $20,000 (R. 2429–2432; but see R. 2309–2310). Petitioner Forman was sentenced to imprisonment for a term of one year and a day and to pay a fine of $5,000 (R. 2433–2434). Petitioner Stanton was sentenced to a term of one year and a day (R. 2435). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (R. 2474-2475).

Petitioners do not argue the sufficiency of the evidence to support their convictions. The evidence in this respect is summarized in the opinion of the court below (R. 2463–2464). The evidence pertinent to the questions of law which petitioners present is summarized in the Argument in connection with the discussion of each question.

ARGUMENT

1. Relying on *Ballard* v. *United States,* 329 U. S. 187, and *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, petitioners challenge (Pet. 7–13) their convictions on the ground that the jurors for the grand and petit juries were not summoned from all of the counties included in the Southern District of New York.

The contention was first raised by motion to dismiss the indictment prior to trial (R. 29–31). Opposing affidavits were filed (R. 33–49), testimony was taken at a hearing (R. 51–66, 67–77), and the motion was subsequently denied (R. 78). The factual picture is reflected in the affidavit of the clerk of the District Court, in which the practice in the Southern District is summarized as follows (R. 42–43):

> The vast majority of jurors are drawn from New York and Bronx Counties and nearby Westchester County. This is done, not for the purpose of excluding residents of other more remote counties, but for practical reasons. Jurors summoned from more remote counties have complained in the past, I am informed, that it was impracticable for them to return home at the end of each court day and that in consequence they incurred the expense of living in New York City, for which they received no reimbursement beyond the statutory four dollar fee paid to all jurors. Moreover their businesses suffered because of their protracted absence. In addition the Government was put to the expense in the case of such jurors of paying their transportation to and from their homes at the end of each week of the term of their jury duty. In view of these facts and further in view of the fact that the applicable statute, Title 28 (Judicial Code) Section 413, U. S. C. requires that jurors shall be returned "so as not to incur an

> unnecessary expense," the practice in this district, for the past few years has been to draw jurors principally from the counties near the Court. However, jurors from more remote districts who indicate their willingness to serve and who meet the statutory qualifications are never excluded but are included in the file of qualified and available jurors. * * *

Petitioners assert that this practice invades their constitutional rights, but it is plain that there is no constitutional problem presented. For the Sixth Amendment entitles a defendant to trial by a jury from the state and district where the offense was committed, and the petitioners were indicted and tried by juries composed of persons from that district. The Amendment does not require that the jurors shall have been summoned from the entire district. *Lewis* v. *United States,* 279 U. S. 63, 72; *Ruthenberg* v. *United States,* 245 U. S. 480, 482.

The question, rather, is whether the practice in the Southern District of New York complies with the statutory requirements which have been imposed. The controlling provision is Section 277 of the Judicial Code (28 U. S. C. 413), which provides:

> Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden

> the citizens of any part of the district with such service.

That the practice in the Southern District satisfies the statutory command is demonstrated quite plainly by Judge Learned Hand's discussion of the problem in his opinion for the court below. The opinion demonstrates that the practice did not deny petitioners an impartial trial (R. 2465–2466) and it is not disputed that it avoids unnecessary expense and the imposition of an undue burden on citizens of the more distant parts of the district who would be separated from their homes and families for the duration of their jury service (except on week-ends) and who would be out of pocket financially.

The argument that there never was an order entered which authorized division of the district is answered by Judge Hand, relying on his knowledge of the practice in the court, as follows (R. 2467):

> The argument proceeds, however, that there was never any order entered in the district which authorized its division, and that in *May* v. *United States* [199 Fed. 53, 59 (C. C. A. 8)] the court, although it recognized the validity of the statute, declared that without such an order the presumption was that the court believed an array drafted from the whole district would be "most favorable to an impartial trial." That may well be true in cases where the court has never either by express order, or

by long recognized practice, in effect divided the district; but in the Southern District of New York, although no express order has been found, it appeared from the testimony of the clerk and his deputy,[2] that for at least ten years before the trial it has been the unbroken practice not to draft jurors from counties north of Westchester, although residents of those counties have in a few cases been accepted, when they volunteered. A practice of such long standing must have been known to the judges of the district and have been approved by them. It is true that Judge Hand and I, who served as district judges in that district, each for more than twelve years, cannot now be sure, after a lapse of over twenty years, that our memories are reliable; yet we believe that the practice existed also in our time which in my own case goes back to 1909.

In its essential aspects, petitioners' argument is the same as that which this Court considered in *Lewis* v. *United States,* 279 U. S. 63, where jurors were not summoned from ten counties in the district. The question there was whether the requirements of Section 277 of the Judicial Code had not been met because there was no evidence of a formal written order directing the clerk not to summon jurors from the entire district. Approval of the practice was inferred from the surrounding circumstances. Similarly here, ad-

[2] See R. 52–54, 57–61.

herence to the practice of summoning prospective jurors from the nearby counties rests on the authority of long recognized practice, dating back, it appears, at least to 1909. The denial of petitioners' motions to dismiss the indictment on this ground and the selection thereafter of a petit jury from a panel summoned in accordance with the usual practice, amply illustrates the district court's approval of the practice.

The decisions in *Ballard* v. *United States*, 329 U. S. 187, 191, and *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 221, recognize the validity of Section 277 of the Judicial Code, and since the practice in the Southern District of New York complies with that provision, there is no comfort for petitioners in those decisions.

2. Petitioners' second contention (Pet. 13–16) is that they were denied a fair trial because of the alleged misconduct of a juror who was excused before the case was submitted to the jury. The fundamental difficulty with the argument is that it does not take cognizance of all the pertinent facts. When the full factual picture is analyzed, it is plain that there is no substance in the contention.

(a) The facts relating to the events prior to the discharge of juror No. 1, Mr. Van Voorhis, may be summarized as follows:

The trial commenced on February 4, 1947, and was concluded on March 26, 1947. On Friday,

March 14, one of the defense counsel suggested to the court that Van Voorhis had failed to disclose to the court when examined on the *voir dire* that he had previously served on a jury in a criminal trial (R. 1730–1732). The court directed counsel to ascertain whether this was true (R. 1732). On the following Monday, March 17, the Assistant United States Attorney informed the court that he had learned that Van Voorhis served as an alternate juror in a trial in 1935 (R. 1781). Petitioners' counsel stated that from their inquiries they believed that Van Voorhis had indicated some hostility in this case by not looking at one of the defense witnesses while he testified and by saying "Huh" to defense counsel when certain exhibits were handed to him (R. 1781–1782). Counsel also informed the court that after the jurors left the courtroom on the previous trial day, Van Voorhis remarked to another juror, that the trial judge was very unfair to the Assistant United States Attorney who was prosecuting the case (R. 1782–1783).[3] The court suggested to counsel that if they desired to urge these matters as a basis for a motion requesting that Van Voorhis be excused and that an alternate juror take his place, they should offer proof to support their motion. Counsel were instructed by the court, "Find out what

[3] A witness later testified that Van Voorhis had said, "I believe, I think that the judge is being unfair with the boy" (R. 2167).

you can as to the facts and then I will hear you." (R. 1784–1785.)

Two days later, on March 19, defense counsel informed the court that they had learned that Van Voorhis had several times served as a juror in criminal cases (R. 1901–1903). The Assistant United States Attorney suggested to the court that he was doubtful that Van Voorhis had been asked whether he had previously served as a juror in a criminal case (R. 1905),[4] and that if the question had been asked, it was possible that Van Voorhis' failure to disclose his prior jury service might have been due to an innocent misapprehension (R. 1906, 1908). The court instructed counsel to search for decided cases which would serve as authorities for their respective positions (R. 1909). In a colloquy later the same day, the court reiterated that it was the defendants' burden to offer formal proof to support their motion (R. 1940).

At the close of all the evidence on March 21, the question as to the alleged misconduct of Van Voorhis was again brought up. At the outset, the court stated (R. 2108):

> Now, about this juror matter: I want to get this matter submitted to me in some proper way where I can get at the facts and do what I think is the right thing under all circumstances. I realize it is a

[4] The examination on the *voir dire* was not stenographically transcribed (R. 1905).

> matter of importance to this juror, and I do not want to remove him and put another person in his place unless I think that justice requires it to be done. At the same time, I want to be fair with the defendants, and if I think that justice requires that he be replaced, I want to do that. * * *

And, again, the court invited defense counsel to submit formal proof as to the facts by affidavit or otherwise (R. 2110, 2113).

On March 26, when counsel had completed their summations, the court again adverted to the Van Voorhis matter and after having been assured that defense counsel did not intend to challenge any of the other jurors, the court announced that Van Voorhis would be excused as a juror at the conclusion of the charge (R. 2255). The court stated that this action was being taken in view of the various charges asserted by petitioners against Van Voorhis and solely because an alternate juror was available and there thus could be no harm in discharging Van Voorhis (R. 2256–2257). The court later talked with Van Voorhis concerning the matter asserted against him and at the conclusion of the trial, the court stated (R. 2293) to the jurors:

> Ladies and gentlemen, I want to clarify this in your minds. If you inferred, from anything I said, that there was an intentional and deliberate misrepresentation of facts by Mr. Van Voorhis, I want to correct that now. The information that I

> have about the matter—and I have investigated it and I have talked with counsel about it—and I say this in justice to Mr. Van Voorhis—I am convinced that there was no intentional or deliberate withholding of information by Mr. Van Voorhis. I think it was a case of misunderstanding of the questions asked, and I am making this further explanation in justice to Mr. Van Voorhis.

It is on the basis of these facts that petitioners urge (Pet. 13–14) that the court committed prejudicial error in not discharging Van Voorhis on March 14, when they first raised the question, rather than at the close of the charge to the jury. It is said (Pet. 16) that "justice deferred may well be justice denied." It may be noted that petitioners never did prove what they asserted. The court ultimately discharged Van Voorhis solely out of an abundance of caution and because there was an alternate juror available.

Even assuming that Van Voorhis should properly have been discharged, there was no unnecessary delay in doing so. The time between March 14, when the motion was first made, and March 26, when it was granted, was consumed by petitioners in seeking out the facts and the pertinent principles of law. Time and again the court told petitioners that if they wanted to press the motion, it was their responsibility to offer formal proof in support of it. That petitioners were well satisfied with the procedure

adopted by the trial judge is plain from the fact that not once during the 12-day interval when the matter was being discussed by counsel and the court did counsel object to the court's action. It is plain, too, that if they had objected, the court would have been justified in denying their motion for lack of supporting proof. For all that petitioners offered the court in respect of the question whether Van Voorhis had failed to disclose prior jury service was the unsupported statements of counsel.

If petitioners believed that the presence of Van Voorhis on the jury was against their best interests they could have protected themselves by speedily adducing the facts in court by competent proof. They were given adequate opportunity to do so. They failed to avail themselves of it.

(b) The second aspect of petitioners' contention involves an assertion—but not proof—that Van Voorhis may have communicated with other jurors after he was removed from the jury. Here, too, the facts need a fuller statement than petitioners have given them.

After sentence had been imposed on petitioners, one of the defense counsel stated to the court that he had learned that after Van Voorhis had been dismissed from the jury and before the jury commenced its deliberations, he went into the jury room and remained there for five or ten

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minutes. It was suggested by counsel that Van Voorhis "might have talked to some of the other jurors and expressed an opinion." (R. 2318–2319.) Counsel candidly stated to the court, "I am surmising, as your Honor knows" (R. 2319).[5] The court informed counsel that in its view "that is [not] the proper way of raising this matter" and that if counsel desired to, he could subsequently properly present the question (R. 2319).

Petitioners did not thereafter file any motion in the trial court seeking to present the question which they had raised. After the appeal was taken, the Government filed a motion in the circuit court of appeals requesting that the case be remanded for the purpose of determining whether there were any improper communications between Van Voorhis and the jury (R. 2443–2445). The motion was grounded on the "Government's interest in a verdict free from any suspicion whatsoever of improper conduct on the part of the jury" (R. 2445). This motion was denied (R. 2446), and petitioners thereafter filed a similar motion in the circuit court of appeals (R. 2451–2456). The Government, having conducted its own investigation in the meantime, opposed the motion on the ground, *inter alia,* that "the moving papers are utterly devoid of any evidence to warrant the inquiry asked for" (R.

[5] Counsel also asserted that Van Voorhis had said that he did not care whether he would be excused; that he had seven others lined up with him for conviction (R. 2319).

2458). The supporting affidavit of the Assistant United States Attorney stated (R. 2460):

> I believe from my conversations with Van Voorhis, Alternate Juror No. 2, the Clerk of the part, and the bailiff in charge of the jury (which conversations resulted in my obtaining affidavits showing that there were no communications whatsoever with respect to this case among Van Voorhis and the other members of the jury after he had been excused from the jury), that the defendants had spoken to the Clerk of the part and the bailiff in charge of the jury on the day following the rendition of the verdict in an attempt apparently to verify the statements which counsel had made to the Trial Judge on the motion to set aside the verdict. In the light of this, the fact that no affidavits were ever submitted and are not submitted now by the defendants to substantiate the allegations which counsel made on the motion to set aside the verdict and which counsel is repeating now in the affidavit attached to the instant motion papers, shows conclusively that the inquiry is merely a "fishing expedition." * * *

Petitioners' motion was thereafter denied (R. 2461).

Quite plainly, the trial judge properly declined to act on the basis of the "surmise" of one of the defense counsel that there may have been improper communication between Van Voorhis and

the jury when Van Voorhis went to the jury room after he was excused, apparently to obtain his belongings. If petitioners desired to raise the question, it was their responsibility, as the trial judge indicated, to present a motion supported by evidence, not surmise. The developments in the proceedings before the circuit court of appeals demonstrate that they had no evidence to support their motion. For the affidavit of the Assistant United States Attorney squarely presented the factual picture and petitioners made no effort to controvert it. In the circumstances, the circuit court of appeals would not have been justified in remanding the case. Both courts properly declined to act until petitioners came forward with proof to support their position. In neither court did petitioners do so.

3. On June 16, 1945, petitioner Stanton gave a statement (R. 1117–1143) to Assistant United States Attorney Bender, which detailed the facts involved in the offense for which he was convicted. This statement was received in evidence at the trial only against Stanton (R. 1116–1117, 1143–1144). Prior to its admission in evidence, the trial court conducted a lengthy preliminary inquiry into Stanton's claim that the statement was not a voluntary one, and the court found that the statement was voluntary (R. 1112–1113, 1091–1092). Evidence bearing on the question whether the statement was voluntarily given was taken before the jury, and they were instructed that the statement

could be considered against Stanton only if they found that it was voluntarily made (R. 2276–2278). The circuit court of appeals found that the evidence relied upon by petitioners as showing that his statement was coerced "is not very convincing in print, and apparently it was not when given in court" (R. 2470), and the contention that the trial judge erred in admitting the statement in evidence was squarely rejected (R. 2470–2471).

Notwithstanding that two courts, and presumably the jury, have found that the statement was voluntarily given, petitioners persist in their contention in this Court. Without stating the evidence which the courts below relied upon in making their findings on the question, petitioners have selected fragments from the entire factual picture, and on the basis of these they argue that it was error for the trial court to admit Stanton's statement in evidence (Pet. 17–18). The opinion of the court below as well as the ruling of the trial judge on the question demonstrate quite plainly, we believe, that the contention is totally without merit.

Since petitioners have not stated the pertinent facts, we shall briefly summarize the evidence which supports the findings of the courts below:

In June 1945, petitioner Stanton was serving a term of imprisonment at the federal prison at Danbury, Connecticut, on his conviction for the unlawful sale of gasoline ration coupons (R. 757–758). On June 6, 1945, Stanton was brought to

New York on a writ of habeas corpus *ad testificandum* and he was confined in the Federal House of Detention in New York City until June 22, when he was returned to Danbury (R. 752). On June 7, less than twenty-four hours after his arrival in New York, Stanton conferred with Mr. Martocci, his lawyer, at the place where he was temporarily confined (R. 755). On June 8, he was taken to the office of Assistant United States Attorney Bender, where he was interrogated concerning the offense involved here (R. 998). At this conference, Stanton was told that the "purpose of bringing you down here is to ask you certain questions and to get from you certain answers or in the event that you wish to exercise your privilege, the statement from you that you refuse to answer a question on the ground that it tends to incriminate you or subject you to a penalty" (R. 2346). Stanton was carefully advised of his constitutional rights and he stated that he also had been advised concerning them by a prison official at Danbury (R. 2347-2348). He answered some questions (R. 2348–2354), but he declined to answer apparently incriminating questions until he had consulted his attorney (R. 2354–2356). Thereupon, he was taken before the grand jury and substantially the same events reoccurred (R. 2357–2365).

Petitioner Stanton was questioned again by an Assistant United States Attorney on June 11, and he evidently again refused to make a state-

ment (R. 928–929). On either June 11 or 13 he indicated to the Assistant United States Attorney that he would like to see his wife who lived in Kingston, New York, to ascertain from her whether petitioner Forman had been financially supporting her while Stanton was in prison (R. 929–930, 987–988). Mrs. Stanton was brought to New York on June 14 and she conferred privately with Stanton for approximately forty-five minutes at the place where he was confined (R. 930–931). At the conclusion of the conference, Stanton asked to be taken to the office of Assistant United States Attorney Bender (R. 931). Mrs. Stanton told Bender that she believed that her husband was prepared to make a statement (R. 940), and Stanton requested that he be given a day or two to collect his thoughts before making the statement (R. 940). Bender was agreeable to Stanton's request, and after a further talk with his wife, Stanton was returned to detention headquarters (R. 940–941).

On June 16, Stanton was taken to Assistant United States Attorney Bender's office and in the presence of two investigators he answered questions put to him by Bender (R. 710, 713, 714, 716, 1071). The taking of the statement lasted for approximately two hours (R. 750–751). There were no off the record discussions in the course of the interrogation (R. 709, 711, 717, 1077); and there were no threats or promises made to Stanton (R. 947, 950, 985, 986, 1076, 1077, 1079, 1080).

The text of the statement discloses that Stanton was fully advised again as to his constitutional rights (R. 1117–1118); that he stated that no threats or promises were made to him and that he had changed his mind about giving a statement for his "own personal reasons" (R. 1118, 1143).

Some seven months later, on January 10, 1946, Stanton, accompanied by counsel who remained outside (R. 875), appeared before the grand jury which returned the indictments involved in these cases (R. 874, 943, 1089). In January 1947, on the day that his parole term expired, petitioner Stanton surrendered himself to the sheriff of Ulster County, where he lived, and told him that "I would like to go down to New York and tell my entire story" (R. 1066–1067). Stanton indicated to the sheriff that he believed that neither his attorney nor petitioner Forman were interested in his welfare and offered to tell his story to him, but the sheriff declined either to hear the full story or to take petitioner into custody (R. 1067–1068). Instead, he notified an agent of the F. B. I. (R. 1073).

Stanton then proceeded to New York City on his own initiative and contacted the office of Assistant United States Attorney Bender. At Stanton's request, an investigator met him at his hotel (R. 943). Stanton told McIntyre, the investigator, that his wife had urged him to tell the "whole story", and that petitioner Forman

had not been of aid to him in securing a job, and that he wanted to make full disclosure to Assistant United States Attorney Block, who was then in charge of the case (R. 944). Stanton gave additional information to Block and discussed the possibility that he might plead guilty to the indictment which was then pending (R. 945, 946).

This evidence, we submit, fully supports the conclusion of the trial judge that the June 16, 1945, statement was voluntarily made. The trial judge stated his reasons for so holding, as follows (R. 1112–1113):

> * * * I reached this conclusion after hearing the evidence and observing the demeanor of the various witnesses. The statement of June 16th was not obtained by duress. If any duress or coercion was used between June 6th and June 14th, which I do not find to have existed, there was sufficient time elapsing between June 14th and June 16th to dispel any continuing effect of such duress, as was the case in *Lyons* v. *Oklahoma,* 322 U. S. 602. There an involuntary confession was [separated] from a subsequent voluntary confession by a period of 12 hours.
>
> * * * * * *
>
> Here the evidence shows that prior to June 14th Stanton did not want to make a statement; that he indicated that if he could talk to his wife he might make a statement; that he was held in New York while officers went to Kingston and re-

> turned with his wife; that after talking to his wife he was given ample time to think the matter over and then voluntarily decide whether he wanted to make a statement. And the evidence shows that he changed his mind about that matter of making a statement, and the evidence shows why he changed his mind after talking to his wife. The statement itself shows that Stanton not only answered questions propounded to him but volunteered much that was not asked. And much of what was volunteered bears on why he changed his mind after talking to his wife.

None of the considerations advanced by petitioners (Pet. 17–18)* detract from the plain fact that Stanton did not confess until he had satisfied himself that petitioner Forman had not helped to support his family while he was in prison (see R. 994). Prior to that time, Stanton had flatly refused to give incriminating information, either to the grand jury or the Assistant United States Attorney. His change in attitude was occasioned,

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* There was ample evidence in the trial court which refutes petitioners' assertion that Stanton's health was undermined while he was confined in New York (R. 326, 878, 935; see R. 755). Similarly, the claim that his counsel was denied access to the Assistant United States Attorney's office while Stanton was there is answered by the undisputed fact that Stanton knew that his counsel was in an anteroom to the office (on another matter (R. 728)), and that he not only did not request his counsel's presence, but also that he strongly urged that his counsel not be brought in (R. 1015, 1078; see, also, R. 996, 1015).

as he said, "for my own personal reasons" (R. 1118, 1143), and his later unsolicited confession in January 1947, after he had been indicted, confirms the fact that he and Forman had had a falling out, and that Stanton was determined to implicate those who were parties to the offense. As both courts below found, the picture is not one of a brow-beaten prisoner who confessed rather than be subjected to coercive measures; it is one, as often happens, of an underling in a criminal venture who for personal reasons determined that he would implicate his partners in crime. We fully agree with the conclusions of both courts below on this question.

4. Two indictments are involved in this litigation. The conspiracy indictment in No. 562 was returned in January 1946, less than three years after the occurrence of the overt acts alleged and proved. The indictment in No. 561, which charged Gottfried and the corporation with filing false and fraudulent statements with the Office of Price Administration, alleged that the offenses occurred on or about April 29, 1942, and was returned January 28, 1946, approximately three years and nine months after the offenses occurred. Petitioners contended in the court below that the latter indictment was barred by the statute of limitations,[7] but the court rejected the argument

[7] The ordinary period of limitations for offenses such as this one is three years, as provided in 18 U. S. C. 582.

(R. 2473) on the ground that the offenses involved fraud on the United States and the statute of limitations was therefore extended by 18 U. S. C. 590a.[8]

In this Court petitioners reassert the contention and urge that the holding of the court below on this question is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Marzani* v. *United States*, No. 9595, decided February 2, 1948, where the court said that the suspension act did not extend

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[8] This statute, which is the Act of August 24, 1942, 56 Stat. 747, as amended by Section 19 (b) of the Contract Settlement Act of 1944, 58 Stat. 667, and Section 28 of the Surplus Property Act, 58 Stat. 781, provides:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

the statute of limitations in respect of the making of false and fraudulent statements in violation of the False Claims Statute (Section 35A of the Criminal Code, 18 U. S. C. 80) except in cases where the fraud results in a financial or property loss to the Government.

Concededly, there is a conflict in principle between the two decisions. We think it clear, however, that the language of the *Marzani* opinion upon which petitioners rely is a dictum, for the judgment of conviction was affirmed, and the court, if it were so inclined, could have disposed of the case without ever reaching the question. The court held that two of the counts involved in that case were within the three-year limitation period, and that either count supported the general sentence which was imposed.

It should be noted, too, that the issue affects only petitioners Gottfried and the corporation. They are the only defendants named in the substantive indictment. The conspiracy indictment was returned less than three years after the overt acts occurred (see R. 23-27).

Thus, although all of the petitioners make the limitations contention, only petitioners Gottfried and the corporation are affected by the question and, we submit, only they are entitled to urge it in this Court.

The *Marzani* dictum was predicated on three decisions of this Court, none of which, we believe, compels the result which the Court of Appeals for the District of Columbia reached. In all three cases, this Court was concerned with the question whether the prosecution was for defrauding the United States and was therefore not barred by the three-year limitation period. In *United States* v. *Noveck,* 271 U. S. 201, this Court held that a prosecution for perjury was not a prosecution for defrauding the United States because defrauding the United States is not an ingredient of the offense of perjury. *United States* v. *McElvain,* 272 U. S. 633, involved a conspiracy to defraud arising out of the making of a false tax return, and this Court held that none of the substantive tax offenses for which the defendant could have been indicted were included in a proviso to the statute of limitations extending the limitation period, and that a conspiracy to commit any of these offenses likewise was not included. In *United States* v. *Scharton,* 285 U. S. 518, a prosecution for attempting to evade taxes by falsely stating taxable income, the Court held that the longer period of limitations was not

applicable because the specific offense charged did not include fraud as one of its ingredients. This Court has never held that a prosecution for filing a false and fraudulent statement with a Government agency, in violation of the False Claims Statute, is not an offense which involves the defrauding of the United States within the meaning of the limitation statute.[10] Indeed, in *United States* v. *Gilliland*, 312 U. S. 86, 93, the Court specifically recognized that a broad concept of fraud is an ingredient of the offense for which Gottfried and the corporation were convicted, and the Court said that it is not restricted to cases involving pecuniary or property loss to the Government.[11] Nothing in this Court's decisions, which seemed controlling to the court in the *Marzani* case, even suggests that where fraud is a specific ingredient of the offense, there also

[10] Compare *Braverman* v. *United States*, 317 U. S. 49, 54–55, where this Court recognized that Congress amended the limitations provisions applicable to criminal tax prosecutions to overcome the results in the *McElvain* and *Scharton* decisions. In these circumstances the *McElvain* and *Scharton* decisions, which the *Marzani* opinion regards as controlling, are quite clearly of dubious significance in showing the congressional purpose in respect of this kind of legislation. That these decisions do not reflect the purpose of Congress in enacting the present statute is borne out by the convincing legislative history which is set forth, *infra*, pp. 30–31.

[11] The indictment here alleges that Gottfried and the corporation "did make and cause to be made, false and fraudulent statements and representations" in a matter before the Office of Price Administration (R. 13; see also R. 18).

must be a showing of a property or financial loss to the Government before the longer limitation period applies.

Even a deeper vice affects the dictum of the *Marzani* opinion. The legislative history of the suspension act—to which no reference is made in the *Marzani* opinion—persuasively demonstrates that the False Claims Statute was brought to the attention of Congress, and that there was a specific congressional intent to extend the period of limitations for violations of that statute, without limitation as to the nature of the fraud.

Thus, the Contract Settlement Act of 1944, provided in Section 19, the enforcement provision, as follows:

* * * * *

> (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C., Supp. II, sec. 590a), is amended to read as follows:
>
> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present

war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

* * * * *

(d) The provisions of section 35–A of the Criminal Code (18 U. S. C., sec. 80)[12] shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

* * * * *

House Report No. 1590, 78th Cong., 2d Sess., p. 28, explains these provisions as follows:

Subsection (b) amends the act of August 24, 1942 (56 Stat. 747). This amendment suspends until 3 years after the termination of hostilities the running of any existing statute of limitations applicable to any Federal offense involving fraud against the United States or connected with the nego-

[12] The statute upon which the instant prosecution is founded.

> tiation, procurement, award, performance, payment for interim financing, cancelation or other termination, or settlement of any war contract.
>
> * * * * *
>
> Subsection (d) deals with the criminal penalties for fraud. It makes clear that the provisions of section 35–A of the Criminal Code (18 U. S. C., sec. 80) also apply to any such statement, representation, or other document made or used or caused to be made or used for any purpose under the act. Section 35–A imposes criminal penalties up to $10,000 in fines and up to 10 years' imprisonment for fraudulent actions involving the Government.

Senate Report No. 836, 78th Cong., 2d Sess., p. 5, similarly emphasizes the fact that the penalty provided by the False Claims Statute is an important enforcement sanction.

The specific reference to the False Claims Statute in Section 19 (d) of the Contract Settlement Act plainly demonstrates to us that Congress intended this important sanction to have the benefit of the suspension of the period of limitations provision in Section 19 (b). But if there is room for any doubt, that doubt must be dispelled by the specific reference in the House Report, first to Section 19 (b) as suspending the period of limitations for offenses involving "fraud", and second to the False Claims Statute as providing criminal

penalties for "fraud", and "for fraudulent actions involving the Government". It is not often that Congress specifically makes its intent so plain. The references on the floor of the House by sponsors of the legislation to the fact that the False Claims Statute provides a criminal enforcement sanction for the Act (90 Cong. Rec. 6060) and to the fact that criminal and civil penalties are provided for "any fraudulent practices" (90 Cong. Rec. 6053) serves only to emphasize the fact that everyone was familiar with the False Claims Statute, and that there would have been little, if any, purpose in providing for the suspension of the limitations period if the provisions were not intended to apply to the most important criminal sanction in the Act. We cannot escape the conclusion that Congress has plainly indicated that the three-year limitation period shall not apply to prosecutions under the False Claims Statute.

The suspension of limitations provision was further broadened in the Surplus Property Act of 1944, 58 Stat. 781, to include any offense committed in connection with the care and handling and disposal of property under the Act. Senate Report No. 1057, 78th Cong., 2d Sess., p. 14, points out that the enforcement provisions of the Act are in addition to "any other civil remedies which the United States may have and of such provisions of the criminal code as relate to *fraud* (18 U. S. C. sec. 80)[13] and conspiracy (18 U. S. C.

[13] The False Claims Statute.

sec. 83)." (Italics added.) Here again the legislative materials make it plain that the same Congress which suspended the limitations period for offenses involving fraud on the United States specifically regarded the False Claims Statute as a "fraud" statute.

As we have said, we do not believe that this Court's decisions compelled the conclusion of the court in the *Marzani* case. But, even assuming the contrary, the legislative materials in respect of the present suspension provision plainly reflect the congressional purpose to suspend the limitations period for violations of the False Claims Statute. Since interpretation of the statutory language must turn on what Congress intended in 1944, there can be little justification for relying on one aid to construction—earlier judicial decisions concerning the meaning of like legislative language—and disregarding the legislative materials which are entitled to great weight. Yet this is what the court of appeals did in the *Marzani* case.

The short of the matter is that we believe the *Marzani* dictum to be in the teeth of the congressional purpose in suspending the period of limitations for frauds on the Government. If the Court, nevertheless, believes that there is sufficient substance to the *Marzani* dictum to warrant resolution of the conflict created by the dictum,

we respectfully submit that the writ should be granted only as to petitioners Gottfried and the corporation (see *supra*, pp. 27–28) and that it should be limited to this question.

Respectfully submitted.

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